

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:05CR3002
	)	
Plaintiff,	)	<b>MEMORANDUM</b>
vs.	)	<b>AND ORDER</b>
	)	
ROOSEVELT ERVING, JR.,	)	
	)	
Defendant.	)	

This matter is before the court on the magistrate judge's report and recommendation (filing 65), and on the defendant's statement of objections thereto (filing 67). I have conducted a de novo review pursuant to 28 U.S.C. § 636(b)(1).<sup>1</sup> I find that the report and recommendation should be adopted and that the defendant's objections should be denied.

Because Magistrate Judge Piester has fully, carefully, and correctly found the facts and applied the law, I need only state that the defendant's motion and amended motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filings 52, 55) should be denied in all respects. Insofar as the defendant objects that Judge Piester failed to make a determination as to whether the defendant's attorney adequately consulted with him about his appeal rights, this claim was not alleged in the defendant's § 2255 motion or amended motion and thus was not at issue at the evidentiary hearing. Indeed, the defendant claimed that he instructed his attorney to file an appeal. In any event, the record shows that I personally advised the defendant

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<sup>1</sup> On April 3, 2007, I entered a memorandum and order (filing 56) that denied the defendant's § 2255 motion and amended motion except insofar as he claims that counsel failed to file an appeal as instructed. I also directed Magistrate Judge Piester to conduct an evidentiary hearing on the non-dismissed claim. The hearing was held on June 11, 2007, and was digitally recorded.

of his right to appeal at the sentencing hearing on December 15, 2005,<sup>2</sup> that the defendant and his attorney both signed a written notice of appeal rights on that same date (filing 40), and that, according to the defendant's attorney, whose testimony Judge Piester found to be credible, the defendant was in fact advised of his rights.

It appears that what the defendant is really complaining about is that he heeded his attorney's advice not to file an appeal. Considering that the defendant received the sentence that he bargained for, it is evident that any claim of ineffective assistance of counsel concerning his attorney's advice is without merit; the defendant has failed to show that he had even one legitimate ground for filing an appeal.<sup>3</sup>

Accordingly,

IT IS ORDERED that:

1. The magistrate judge's report and recommendation (filing 65) is adopted;
2. Defendant's objections to the report and recommendation (filing 67) are denied;
3. Defendant's motion and amended motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filings 52, 55) are denied in all respects; and

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<sup>2</sup> The defendant's sentencing hearing was also digitally recorded.

<sup>3</sup> I previously rejected on the merits the defendant's claims that he received ineffective assistance of counsel when he was advised to accept a very favorable plea bargain and to forego the filing of a motion to suppress his confession. As I stated then, "the defendant was fully aware that he was facing forty years in prison when he tendered his guilty plea and before that plea was accepted." (Filing 56, at 13.)

4. Judgment shall be entered by separate document.

July 9, 2007.

BY THE COURT:

*s/ Richard G. Kopf*  
United States District Judge